

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EDDIE RYAN LEWIS,

Plaintiff,

CASE NO. 1:12-CV-328

v.

HON. ROBERT J. JONKER

MARY BERGHUIS,

Defendant.

ORDER ON REPORT AND RECOMMENDATION

The Court has reviewed Magistrate Judge Brenneman's Report and Recommendation (docket # 4) and Petitioner Lewis's Objections to Report and Recommendation (docket # 7). Under the Federal Rules of Civil Procedure, where, as here, a party has objected to portions of a Report and Recommendation, "[t]he district judge . . . has a duty to reject the magistrate judge's recommendation unless, on de novo reconsideration, he or she finds it justified." 12 WRIGHT, MILLER, & MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3070.2, at 381 (2d ed. 1997). Specifically, the Rules provide that:

The district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

Fed R. Civ. P. 72(b). De novo review in these circumstances requires at least a review of the evidence before the Magistrate Judge. *Hill v. Duriron Co.*, 656 F.2d 1208, 1215 (6th Cir. 1981).

The Court has reviewed de novo the claims and evidence presented to the Magistrate Judge; the Report and Recommendation itself; and Petitioner's objections. The Magistrate Judge recommended denial of Petitioner's petition based upon failure to satisfy the applicable statute of limitations. In reaching his decision, the Magistrate Judge noted that Petitioner had not raised the issue of equitable tolling or alleged any facts or circumstances that would warrant equitable tolling in this case. (R. and R., docket # 4, at 8.) Petitioner's Objection addresses equitable tolling and includes information and evidence not previously available to the Magistrate Judge. The Court believes it is preferable to decide the issue of equitable tolling on a complete record. The Court therefore **DECLINES TO ACCEPT** the Report and Recommendation (docket # 14) and **REMANDS** the matter to the Magistrate Judge for consideration of the equitable tolling theory in the first instance.

IT IS SO ORDERED.

Dated: September 18, 2012

/s/ Robert J. Jonker
ROBERT J. JONKER
UNITED STATES DISTRICT JUDGE